

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)
)
Respondent,)
)
v.)
)
RAFAEL CARRISOZA RIVERA,)
)
Petitioner.)
_____)

2 CA-CR 2008-0143-PR
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053460

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Law Office of Patrick C. Coppen
By Patrick C. Coppen

Tucson
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V Á S Q U E Z, Judge.

¶1 Appellant Rafael Rivera was charged by indictment with aggravated driving under the influence of intoxicating liquor (DUI) while his license was suspended, revoked, or restricted; aggravated driving while there was an illegal drug or its metabolite in his body while his license was suspended, cancelled, revoked, or in violation of a restriction; possession of marijuana; and possession of drug paraphernalia. The state alleged Rivera previously had been convicted of felonies, previously had been convicted of DUI, and had committed the instant offenses while on release in another cause. Pursuant to a plea agreement, Rivera pled guilty to aggravated DUI and admitted he had one historical prior felony conviction for aggravated DUI. The trial court sentenced him to the presumptive, enhanced prison term of 4.5 years, to be served consecutively to the term he was serving in CR-20043560. In his petition for review to this court, Rivera challenges the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Pursuant to that petition, appointed counsel suggested at a hearing that the trial court might have abused its discretion in imposing a consecutive prison term and in failing to consider or give adequate weight to evidence in mitigation at sentencing.

¶2 We will not disturb a trial court's decision to grant or deny post-conviction relief absent an abuse of discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Similarly, trial courts generally are vested with broad discretion to determine the sentence that is appropriate under the circumstances, and absent an abuse of that discretion, we will not disturb the sentence it imposes. *State v. Stotts*, 144 Ariz. 72, 87,

695 P.2d 1110, 1125 (1985). Whether to impose concurrent or consecutive prison terms is also left to the trial court to determine in the exercise of its discretion. *State v. Ward*, 200 Ariz. 387, ¶¶ 4-5, 26 P.3d 1158, 1159-60 (App. 2001). In that regard, A.R.S. § 13-708 “neither creates a presumption for consecutive or concurrent sentences, nor imposes any restrictions on a trial court’s discretion in choosing between consecutive or concurrent sentences.” *Id.* ¶4; *see also State v. Garza*, 192 Ariz. 171, ¶ 11, 962 P.2d 898, 901 (1998). Unless a sentence is outside the statutory range or otherwise contrary to the applicable law, or the trial court has acted arbitrarily, capriciously, or without adequately considering the facts relevant to determining the appropriate sentence, we will not disturb the sentence. *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996).

¶3 Rivera conceded below that he has no statutory or constitutional right to a concurrent prison term. And, as Rivera noted, the plea agreement provided either could be imposed. Rivera also acknowledged § 13-708 permits the sentencing judge to impose either a concurrent or consecutive term and does not create a presumption in favor of consecutive terms. Nevertheless, at the hearing on the petition, appointed counsel asserted the trial court had abused its discretion by imposing the consecutive term because the court had considered inaccurate information that was stated in or suggested by the presentence report. Specifically, Rivera complained the presentence report erroneously suggested he had been substantially impaired when police stopped him and that the court, relying on his history of criminal conduct, erroneously had characterized him at sentencing as a “career [criminal],”

which Rivera contends is contrary to *Garza*. He asserted *Garza* stands for the proposition that a sentencing judge may not consider the defendant's entire criminal history in determining whether to impose consecutive prison terms but can only consider the defendant's conduct related to the "subject offenses."

¶4 After the argument on Rivera's post-conviction petition,¹ the trial court denied relief, noting at the end of the hearing and in its minute entry that it had reviewed the entire record before concluding the consecutive term was appropriate. The court added that it agreed "with defense counsel that this was not an extremely aggravated DUI concerning the BAC [alcohol concentration] level; however, alcohol, cocaine and marijuana were detected." Additionally, the court stated in its minute entry, as it had at the hearing, that Rivera "has four prior felonies and two prior aggravated DUIs."

¶5 On review, Rivera essentially reiterates the arguments he made at the hearing below. But he has failed to sustain his burden of establishing the trial court abused its sentencing discretion, either when it imposed the consecutive term or when it had the opportunity to reconsider the propriety of the sentence in light of the arguments raised in Rivera's petition for post-conviction relief. The trial court was well aware of our supreme court's decision in *Garza*, specifically noting the case in a separate minute entry. Moreover,

¹Rivera contends the trial court denied relief after an evidentiary hearing. But the transcript from that hearing makes clear it was not an evidentiary hearing pursuant to Rule 32.4, Ariz. R. Crim. P.; rather, Rivera's counsel was given an opportunity to argue the matter extensively to the court.

as we previously noted, the court agreed with Rivera that he had not been substantially impaired when he was stopped. Nevertheless, the court found consecutive terms were appropriate.

¶6 The presumptive, consecutive prison term imposed was well within the statutory range, and nothing in the record before us establishes the trial court abused its discretion either when it imposed the sentence initially or when it confirmed the propriety of the sentence after briefing by the parties in this proceeding and extensive discussion during oral argument. *Garza* does not require us to find otherwise. There, the court held that § 13-708 does not create a presumption in favor of imposing consecutive prison terms; “[i]t merely requires the judge to set forth reasons for imposing concurrent rather than consecutive sentences and creates a default designation of consecutive sentences when the judge fails to indicate whether the sentences are to run concurrently or consecutively.” 192 Ariz. 171, ¶ 12, 962 P.2d at 902.

¶7 Here, the trial court was clearly aware that there is no presumption in favor of either consecutive or concurrent prison terms. The court had also been well aware of those factors that could be regarded as mitigating. Trial counsel had filed a sentencing memorandum and had urged the court at the sentencing hearing to impose a prison term that would be concurrent with the term Rivera was already serving. But the court soundly exercised its discretion in rejecting that request and ordering Rivera to serve the sentence in this case consecutively to the sentence in another cause. As the transcript from the hearing

on Rivera's petition for post-conviction relief shows, the court again considered the circumstances relevant to sentencing in this proceeding, counsel having pointed out what he characterized as incorrect information in the presentence report. The court's comments show it found most compelling Rivera's history of criminal conduct and the fact that this was his third conviction for aggravated DUI. Rivera contends the court was not permitted to consider those factors, but he is mistaken. *See, e.g., State v. Hester*, 145 Ariz. 574, 577-78, 703 P.2d 518, 521-22 (App. 1985); *State v. Thompson*, 139 Ariz. 552, 555, 679 P.2d 575, 578 (App. 1984). The trial court rejected Rivera's argument that *Garza* precluded it from considering his criminal history; so, too, do we. On the record before us, we have no basis for interfering here.

¶8 We grant the petition for review but, for the reasons stated, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge